267

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 83

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 11, 1923

(29,678)

265 U.S. 209

The act of 1852, which contains
clauses changed "per head" to
50 % of the regular rate —
but repealed as to Sundays
by 93 US 462

The act of '82 would not bind the
Carriers under receipts —

(29,678)

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 7, 1924

[fol. 1] IN THE

COURT OF CLAIMS

No. 33864

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY

vs.

THE UNITED STATES

I. PETITION—Filed Oct. 29, 1917

To the Honorable the Chief Justice and Judges of the Court of Claims:

Your petitioner, the Chicago, Milwaukee and St. Paul Railway Company, respectfully shows to your Honors the following stated facts:

I

Petitioner is a corporation organized under the laws of the State of Wisconsin. It operates and at the times hereinafter stated did operate a system of railways in the States of Illinois, Michigan, Wisconsin, Minnesota, Iowa, Nebraska, North Dakota, South Dakota, Montana, Idaho and Washington.

[fol. 2] II

By numerous acts in the years 1850 to 1866 Congress made grants of land to aid the construction of lines of railroad described in said acts. By said acts the builders of the railroads were to have all alternate sections of land in designated belts extending in both directions from the roadway, and in case, by reason of sales or other grants, any of said alternate sections were no longer owned by the United States, said builders were to select and have lands to the same amounts within other limits bordering such belts; which lands, granted by said supplemental enactments, were thereafter known as "lieu lands." Under the earlier of said enactments the limit of the basic grant was six miles, on either side of the roadway, and the limit from the roadway, for the selection of lieu lands, was fifteen miles (Acts of Congress approved September 20, 1850; June 10, 1852; June 3, 1856; March 3, 1857. 9 Stat. 466; 10 Stat. 8; 11 Stat. 20; 11 Stat. 195). By later enactments, because of deficiencies in the lands then owned by the United States within said limit of fifteen miles, selection of lieu lands was allowed up to a limit of [fol. 3] twenty miles from the roadway (Acts of Congress approved March 3, 1863; May 12, 1864; July 1, 1864; July 4, 1866. 12 Stat. 772; 13 Stat. 72; 13 Stat. 339; 14 Stat. 87). Others of the later enactments, relating either to grants for an individual railroad

or to all grants within a State or States named, extended to twenty miles various previous limits for final selections of lands (Acts of Congress approved June 2, 1864; March 3, 1865; July 4, 1866; July 13, 1866. 13 Stat. 72; 13 Stat. 526; 14 Stat. 87; 14 Stat. 97). By another late enactment approved June 6, 1874 (18 Stat. 74), an original grant was made of lands for a width of ten sections on each side of the railways to be constructed, with a limit of twenty miles within which lieu lands might be selected.

III

A number of the railway lines operated by petitioner were constructed by the aid of lands granted by said acts of Congress. Among those are one line extending across the State of Minnesota from Hastings to Ortonville, and another line extendig almost across said State, viz., from Houston to Airlie. As regards said lines of [fol. 4] petitioner, other than those two, the act making the grant contained the following clause:

"The said railroad shall be and remain a public highway for the use of the Government of the United States free of all toll or other charge upon the transportation of any property or troops of the United States." (Act of May 12, 1864, section 3.)

As regards said two lines in Minnesota the act making the grant contained the following clause:

"The said railroad shall be and remain a public highway for the use of the Government of the United States free of all toll or other charge upon the transportation of any property or troops of the United States, and the same shall at all times be transported at the cost charge, and expense in all respects of the company or corporation, or their successors or assigns, having or receiving the benefits of the land grants herein made." (Acts of July 4, 1866, section 3.)

IV

By acts approved March 3, 1873 (17 Stat. 558) and July 12, [fol. 5] 1876 (19 Stat. 170), Congress fixed the rates of compensation to be paid railroad companies generally for the transportation of mails, and in said act of July 12, 1876, it was provided that, with respect to transportation over land-aided railroads, there should be paid only eighty per cent of the rates so established. Until in 1880 there was discussion and controversy, but without any authoritative decision, regarding the compensation to be paid by the United States for transportation of passengers and freights over land-aided railways. By a Sundry Civil appropriation act approved March 3, 1879 (20 Stat. 390), it was provided that, pending adjustment of claims of the railroad companies with respect to such service, there might be paid by the War Department a maximum of fifty per cent of the amounts payable by private persons, under the ordinary railroad tariffs, for like transportation; and in 1880 it was decided by

this court, with regard to passenger and freight transportation, that the United States was obliged to pay for services on land-aided railroad as on others, the value of the use of the equipment employed, as distinct from the roadway, and that this was fifty per cent of the [fol. 6] value of the services as fixed by such ordinary tariffs. (15 C. Cl. 126-151.)

An act of Congress approved June 30, 1882 (22 Stat. L., pp. 117, 120, 121) making appropriation for the support of the army, contained the following provision:

"For the payment for army transportation lawfully due such land-grant railroads as have not received aid in Government bonds, to be adjusted by the proper accounting officers in accordance with the decisions of the Supreme Court in cases decided under such land-grant acts, but in no case shall be more than fifty per centum of the full amount of the service to be paid, one hundred and twenty-five thousand dollars; Provided, That such compensation shall be computed upon the basis of the tariff rates for like transportation performed for the public at large, and shall be accepted as in full for all demands for said services: And provided further, That any such land-grant roads as shall file with the Secretary of the Treasury their written acceptance of this provision shall hereafter be paid for like services as herein provided; and all accounts of such railroads for services heretofore rendered shall be audited and paid as herein [fol. 7] provided upon application of such roads and their acceptance of such sum in full of all claims for such services; and all laws inconsistent herewith are hereby repealed."

A deficiency appropriation act of Congress approved August 5, 1882 (22 Stat. 261, 262; Sup. Rev. Stat. Vol. 1, ch. 390, p. 375), contained the following provisions:

"For the payment of Army transportation lawfully due such land-grant railroads as have not received aid in Government bonds, to be adjusted by the proper accounting officers in accordance with the decisions of the Supreme Court in cases decided under such land-grant acts, but in no case shall more than fifty per centum of the full amount of the service be paid, one hundred and twenty-five thousand dollars; Provided, That such compensation shall be computed upon the basis of the tariff rates for like transportation performed for the public at large, and shall be accepted in full for all demands for said services; And provided further, That any such land-grants roads shall file with the Secretary of the Treasury their written acceptance of this provision shall hereafter be paid for like services as herein provided; and all accounts of such railroads for services [fol. 8] herein provided upon application of such roads and their acceptance of such sum in full of all claims for such services."

As to all of said land-aided roads and railways operated by petitioner, written acceptances of said provisions for payment of their bills were filed by the proper officers with the Secretary of the Treas-

ury. No aid in Government bonds was received by any of said land-aided railways operated by petitioner.

V

Before 1909 petitioner had agreed with the authorized officers of the United States that for all transportation for Government account its rates would be equal to the lowest that would be afforded through land grants by any railway lines between the same terminal points. Such lines as competed with said two lines of petitioner in the State of Minnesota had received grants in the first only of the forms set out in paragraph III hereinbefore and there had been allowed and paid to them always the fifty per cent rates described in paragraph IV hereinbefore.

[fol. 9] VI

In the years 1909 to 1916 inclusive there occurred frequently upon said land-aided railways operated by petitioner shipments in which the property belonged to private owners but the shippers or the consignees, or both, were officers or agents of the United States. In such shipments there were used bills of lading, made up by the consignors, which were on forms that had been prepared by officers of the United States and for its use, and therefore were known in railway offices as "Government bills of lading;" which forms had been furnished to the consignors by officers of the United States having authority over transportation of its property. In receiving and transporting such freights petitioner's officers believed that the same belonged to the United States, and until in the latter part of the year 1916 petitioner never received any intimation that the same were private property.

VII

In settlements made with respect to many of such shipments, which had moved over said land-aided lines of petitioner other than [fol. 10] said two in the State of Minnesota, the accounting officers of the Government deducted and withheld fifty per cent of the revenue accruing, at the ordinary tariff rates applying to transportation for private account, to such land-aided mileage. The aggregate amount of said deductions is forty-seven thousand dollars ($47,000). With respect to many others of said movements, which were on said two land-aided lines in Minnesota, there was deducted and withheld in such settlements the entire compensation accruing, at such tariff rates, to such land-aided mileage. The aggregate amount of those deductions is twenty-four thousand dollars ($24,000).

VIII

Petitioner says that said two provisions of the land-grant acts set out in paragraph III hereinbefore have no relation to any freights that did not belong to the United States. It says further that the

intention of Congress, in the enactments of June 30, 1882, and August 5, 1882, quoted in paragraph IV hereinbefore, was that all railways which had received no bond-aid, but had received land-aid, [fol. 11] whether upon the first or the second of said conditions set out in paragraph III, were to be upon the same footing and that, for transportation on any of them, fifty per cent of the tariff rates should be paid. It says therefor that, if any of said freights transported over either of its said lines in the State of Minnesota belonged to the United States, there should be paid therefor fifty per cent of the tariff rates.

Petitioner prays judgment against the United States for the total of said deductions of said two classes, to wit: the sum of seventy-one thousand dollars ($71,000); the same being entirely unpaid, and its claim to the same not having been assigned wholely or in part.

Chicago, Milwaukee and St. Paul Railway Company, by Benj. Carter, Its Attorney in Fact. Carter & Ashford, Attorneys for Claimant.

[fol. 12] Jurat showing the foregoing was duly sworn to by Benj. Carter, omitted in printing.

[fol. 13] II. General Traverse—Filed Dec. 29, 1917

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. Argument and Submission of Case

On October 31, 1922, this case was argued and submitted on merits by Mr. Benjamin Carter, for the plaintiff, and by Mr. Charles F. Jones, for the defendant.

[fol. 14] **IV. Findings of Fact, Conclusion of Law, and Opinion of the Court by Hay, J.**—Entered November 13, 1922

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact

I

Plaintiff is a corporation organized under the laws of the State of Wisconsin. It operates and at the times hereinafter stated did operate a system of railways in said State and other States.

II

A number of plaintiff's lines of railway were constructed by the aid of the lands granted by an act of Congress containing the following clause: "The said railroad shall be and remain a public highway for the use of the Government of the United States free of all toll or other charge upon the transportation of any property or troops of the United States." (Act of May 12, 1864, sec. 3.)

III

Two of plaintiff's lines of railway, (1) from Hastings to Ortonville and (2) from Houston to Airlie, were constructed with the aid of public lands granted by Congress under the act of July 4, 1866, section 3 of which contains the following clause: "The said railroad shall be and remain a public highway for the use of the Government of the United States, free of all toll or other charges upon the transportation of any property or troops of the United States, and the same shall at all times be transported at the cost, charge, and expense in all respects of the company or corporation, or their successors or assigns, having or receiving the benefits of the land grants herein made."

[fol. 15]

IV

Some of said consignments consisted of coals for the use of Indian schools. The shipments were from mines in Illinois to schools at Standing Rock Agency or Wahpeton, in North Dakota; Greenwood, Yankton, Flandreau, in South Dakota; or Pipestone, in Minnesota. The coals so shipped were obtained under three contracts of the dates respectively stated, viz. (1) contract of the Commissioner of Indian Affairs with the Northwestern Fuel Company, July 9, 1909; (2) contract of the Commissioner of Indian Affairs with Dennison V. Smith, October 8, 1910; (3) contract of the superintendent at Wahpeton with the Berwind Fuel Company, September 5, 1910. By each of said contracts the price named was to apply free on board cars at the mines, but each contract provided that rigid inspection of the coal should be made at places and by person to be designated by the contracting officer of the Government, and if any of the supplies should fail to conform with samples furnished the same should be rejected and the other party should remove the same from the Government premises. Inspectors were appointed as so provided, and by designation and direction of said officers of the Government they inspected the coals at said points of designation; and before payments were made for any coals accepted certificates of such inspection and approval were made by said inspectors.

V

Others of said consignments consisted of coals for quartermaster uses at Fort Snelling, Minnesota; the same being obtained by a con-

tract of the United States quartermaster at St. Paul, Minnesota, with Crerar, Clinch & Co., signed in 1912, and shipments being from mines at Clinch, in Illinois. The price named applied at the mines, free on board cars, but the contract provided that the coals should be subject to "inspection and acceptance or rejection by receiving quartermaster at final destination." Samples were in fact taken and inspection made, and thus acceptance or rejection of the coal determined at Fort Snelling.

VI

Others of said consignments consisted of coal, sand, and cement delivered at Minnehaha, Minnesota, for engineering use on a lock and dam improvement, the same being obtained by contracts of the district engineer of the Corps of Engineers of the Army having his office at St. Paul, Minnesota, with divers persons. Prices were named in said contracts for delivery on board cars at points of shipment, but it was provided that inspection of all of said materials should be made in Minnehaha by Government officers to determine acceptance or rejection thereof. Successive and exhaustive tests of cement were in fact made, and the coal and sand were visually inspected by the Government's officers at the site of the work, and there were some rejections both of cement and of coal, and the contractors were required to remove and did remove such rejected materials from the site of the work.

[fol. 16]

VII

Others of said consignments consisted of piling and other lumber for said engineering improvement at Minnehaha obtained by said district engineer at St. Paul, or for harbor improvements near Racine, Wisconsin, obtained by the district engineer of said corps at Milwaukee, Wisconsin. Said materials were furnished under contracts with numerous millers in the State of Washington. By arrangement of said engineers the contracts were negotiated by the district engineer of said corps at Seattle, Washington. The contracts provided for inspection of the materials at the mills, upon or before the loading onto cars. Such inspection was in fact made at those points by attaches of said Seattle office and the results thereof were certified to said district offices at St. Paul and Milwaukee. No inspection was provided for, and none was made, at the points of destination except to determine that the true quantities of the several shapes and dimensions made were furnished.

VIII

Others of said consignments consisted of piling and other lumber obtained by the district engineer of said corps at Kansas City, Missouri, from various millers in the State of Oregon for use in the improvement of the Missouri River at points near Sioux City, Iowa.

Bids were received in answer to invitation which prescribed that prices should be named for delivery free on board cars at points of shipment. The agreements contained the following clauses: "The prices will be for the articles delivered f. o. b. cars at ——. The successful bidder will procure the cars, but the United States will pay the freight and furnish shipping instructions and bills of lading. This arrangement is made to enable the Government to take advantage of land-grant rates, and will not operate to relieve the dealer of any of the responsibilities as shipper that would attach if the delivery had been at destination."

IX

Others of said consignments consisted of piling and other lumber obtained by the district engineer of said corps at Chicago, Illinois, for improvement of the Calumet River near Chicago under contracts with the Douglas Fir Sales Co., and the Union Lumber Co. The invitations for bids prescribed that prices be named for delivery free on board at points of shipment. The contracts contained the following clauses:

"Art. 2. All materials furnished and work done under this contract shall be subject to a rigid inspection by an inspector appointed on the part of the United States, and such as do not conform to the specifications of this contract shall be rejected. The decision of the contracting officer as to quality and quantity shall be final."

Art. 9. Until final inspection and acceptance of and payment for all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract."

[fol. 17] The supplies furnished under said contracts were inspected upon delivery at Chicago by officers of the Government with respect to qualities before acceptance.

X

It is not shown whether the plaintiff, when said freights were received and transported and when its bills were rendered and payment received, was or was not informed of the conditions of the contracts or orders with reference to inspection and acceptance or rejection at point of destination, or when, if thereafter, it was so informed.

XI

In every instance the plaintiff's bills were presented to the Government for payment of the net freight for the transportation of said coal, sand, cement, and other articles after the proper land-grant deductions had been made by the plaintiff in stating its bills,

and payment was made to the plaintiff of the full amount claimed on that basis and accepted without protest.

XII

The Government form of bills of lading used in the transportation of the articles in question provided on its face for the hauling of Government property only, and the directions on the back of same limited their use to Government property. The agreement on the back of the same between the United States and the carrier stipulated that the prepayment of charges should in no case be demanded by the carrier nor should collection be made from the consignee; on presentation to the office indicated on the face of the bill of lading, properly accomplished, attached to freight, voucher prepared on authorized Government form, payment would be made to the last carrier unless otherwise specifically stipulated; the shipment was to be made at the restricted or limited valuation specified in the tariff or classification, at or under, on which the lowest rate would be available unless otherwise indicated on the face of the bill of lading.

XIII

The only land-grant deductions made on account of transportation over lines in Minnesota extending from Hastings or Ortonville and from Houston to Airlie are from the following bills and in the amounts therein shown:

Pg.	Bill	Deduction
13	8710	$44.61
16	8980	66.91
30	11485	20.32
30	11592	41.10
30	11700	63.75
30	11823	138.90
30	11956	119.22
31	12035	22.56
31	12020	137.03
37	7650	13.08

[fol. 18]

XIV

It does not accurately appear in the record what the amount is which the claimant is claiming. Various items claimed are referred to in the record, but they are not proved.

Conclusion of Law

Upon the foregoing findings of fact, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover. It is therefore adjudged and ordered that the petition of the plaintiff be,

and the same is hereby, dismissed. Judgment is awarded against the plaintiff for costs in printing the record in this case, the amount thereof to be entered by the clerk and collected by him according to law.

OPINION

HAY, Judge, delivered the opinion of the court:

This is a suit brought by the plaintiff to recover from the United States the sum of about $53,000, which it claims was improperly withheld from it by reason of the application of land-grant freight rates to shipments on Government bills of lading.

The gravamen of the plaintiff's complaint is that the property which was shipped over its lines was not Government property, but was property belonging to private persons, and was therefore not subject to land-grant deductions. The evidence in the case discloses that in every instance the property belonged to the Government, and therefore the plaintiff is not entitled to recover.

As to two items of the claim amounting to $334.75, the difference between 50 per cent and 100 per cent land-grant on Government property transported over its two lines of railway from Hastings to Ortonville and Houston to Airlie in the State of Minnesota, it is contended by the plaintiff that it only ought to be charged with 50 per cent land-grant, whereas it has been charged with 100 per cent land-grant deduction.

The act under which the two lines referred to received Government aid to lands reads as follows: "That said railroad shall be and remain a public highway for the use of the Government of the United States free of all toll or other charge upon the transportation of any property or troops of the United States, and the same shall at all times be transported at the cost, charge, and expense in all respects of the company or corporation, or their successors or assigns having or receiving the benefits of the land grants herein made." Act of Congress, approved July 4, 1866, 14 Stat. 88.

Under the provisions of this statute Government property was to be transported over these roads free of charge. It does not appear that Congress has since the enactment of this law passed any statute which will relieve the plaintiff from its obligation to transport Government property free of charge. It is true that the plaintiff refers us to an act approved October 6, 1917, 40 Stat. 361, which might be construed to relieve the plaintiff of its obligation if the shipments in question had been made during the emergency for which the act provided, but the shipments were made long before that time, and the [fol. 19] act expressly provides that it "shall not be construed as changing in any other way or for any other period of time the rights and duties of the land-grant railroads."

The plaintiff also refers to the transportation act, 41 Stat. 456. The petition of the plaintiff was filed October 29, 1917, and all the transactions, and the claims arising from them, were had prior to the passage of the act. The act of 1920 can not be invoked on behalf of claims arising long before the passage of the act.

In view of what has been said it is hardly necessary to refer to the fact that the bills of the plaintiff were presented to the officers of the Government with land-grant deductions, were paid as presented, and payment of the same was accepted by the plaintiff without protest. It is not perceived how the plaintiff can now reopen this question of payment, even though the property transported was not the property of the Government, or how if it were not property of the Government the latter could be made liable at all for its transportation without affirmative proof that some agent of the Government was authorized to create a liability for the transportation of property not belonging to the Government.

The petition of the plaintiff must be dismissed. It is so ordered.

Graham, Judge; Downey, Judge; and Campbell, Chief Justice, concur.

[fol. 20] IN THE COURT OF CLAIMS

V. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the Thirteenth day of November, A. D., 1922, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed; And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of One hundred and forty dollars and sixty-eight cents ($140.68), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

IN THE COURT OF CLAIMS

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On January 10, 1923, the plaintiff filed a motion to amend the findings of fact. On January 29, 1923, this motion was overruled by the Court.

IN THE COURT OF CLAIMS

VII. PLAINTIFF'S APPLICATION FOR APPEAL—Filed March 29, 1923

Claimant by its attorney shows to the court that this case involves more than fifty-two thousand dollars ($52,000.00); that on November 13, 1922, judgment was rendered by this court dismissing the petition and findings of fact were filed; that a motion of claimant was thereafter filed on January 10, 1923, to set aside said judgment and to amend said findings, and on January 29, 1923, said motion was, in both particulars, overruled by the court. Claimant hereby [fol. 21] applies for an appeal to the United States Supreme Court.

Benj. Carter, Attorney for Claimant.

[File endorsement omitted.]

VIII. ORDER OF COURT ALLOWING APPEAL

It is ordered by the Court that the plaintiff's application for appeal be and the same is allowed.

Entered April 2, 1923.

COURT OF CLAIMS

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Hay, J.; of the judgment of the court; of the plaintiff's application for an appeal to the Supreme Court; of the order of the Court allowing said appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Seventeenth day of April, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 29,678. Court of Claims. Term No. 83. Chicago, Milwaukee and St. Paul Railway Company, appellant, vs. The United States. Filed June 11, 1923. File No. 29,678.

INDEX

CASES CITED.

Supreme Court of the United States.

October Term, 1924.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, *v.* THE UNITED STATES. } No. 83.

BRIEF FOR APPELLANT.

This case, being an appeal from the Court of Claims, presents in a double aspect a claim of appellant for compensation with respect to transportation done on land-aided lines of railroad. One question, the least important as regards the amount involved, is the Government's right to free transportation over some lines. The other question is the applicability of land-grant rates, viz: fifty percent of those fixed by the commercial tariffs, to transportation over those particular lines and others. With the latter of these, though on facts not identical with those which occur in this case, the court just now is familiar; a case of the Illinois Central Railroad Company, No. 248 of the October Term of 1922, on the same general question of action, having been decided on May 26, 1924.

Since there are no complications of fact, it is assumed that the argument presented below will be deemed a sufficient statement of the case.

Assignment of Errors.

Appellant says the Court of Claims erred:

1. In holding that materials transported which the

Government had the option to accept or reject at points of delivery were the property of the Government while in transit.

2. In holding that land-grant rates were applicable to the transportation of materials which the Government did not accept until after delivery at destination.

3. In holding that the legislation and adjudications by which compensation from the Government was fixed at fifty percent tariff rates for land-aided railroads did not apply to all railroads included in that description.

4. In holding that the railroads classed as "free land-grant" lines were not, under the Army Appropriation Act of June 30, 1882, (22 Stat. pp. 117, 120, 121) and the Deficiency Act of August 5, 1882 (22 Stat. pp. 257, 261), entitled to compensation from the Government at such fifty percent rates.

5. In dismissing the petition.

ARGUMENT.

This is one of three suits brought at the Court of Claims, which, beside other questions, present one question common to all. One which presents the common question, and none other, is that of the *Illinois Central Railroad Company* v. *United States*, No. 248 of the October Term of 1922, which was decided by this court adversely to the claimant on May 26 last. In the case here presented, and the case of the *Louisville and Nashville Railroad Company* v. *United States*, No. 29, that common question arises with other questions distinct from each other.

Application of Land-grant Freight Rates to Private Property.

The question presented and decided in the Illinois Central case was the applicability of land-grant freight

rates to materials, bought by the Government, at prices accruing at points of shipment, but with stipulations holding the shippers (sellers) responsible for all incidents of the transit, including demurrage for delays, unloading without injury at destinations and, in some instances, care of the property at destinations pending the physical taking of it by the Government's agents.

A somewhat comprehensive brief was filed in that case, and permission will be requested to use it in this case in connection with a few observations here to be made.

It should be understood at the outset that the terms of the contracts between the Government and the shippers (sellers) in the instant case differ from those of the Illinois Central case in regard to subject matter and to details regarding the termination of the railroad haul and places and methods of unloading of freights.

It is assumed that if there had been definite recitals in the contracts that the payment, or advancing, of the freight charges by the Government would have no effect on the properties while in transit, and that the title should remain in the shippers until delivery, inspection and rejection at the points of destination, it would be conceded that the properties while in transit belonged to the shippers and that full rates were to be paid for their transportation, by whomsoever paid? The appellant submits that the actual stipulations to which it refers in the contracts were, in their legal effect, nothing more nor less than these hypothesized recitals.

Findings of fact made by the Court of Claims, IV to IX inclusive, say that the contracts of purchase provided for inspection and sampling at destinations as preliminary to acceptance or rejection of the materials. Particular points distinctly made by one finding (VI),

relating to coal, sand and cement delivered at Minnehaha, Minnesota, for use on a lock and dam improvement, are that, in accordance with the contracts, final and exhaustive tests of coal and cement actually occurred at the site of the work, and thereupon there were rejections both of coal and of cement shipments and the contractors who furnished them were required to remove, and did remove, those consignments of materials.

If the Government's contention regarding these shipments were correct, it would be possible to point out the identical stages of the transactions at which title passed to the Government. But evidently there was no transmission of title. When the materials were moving on the cars, the relations to the parties were just what they were when the cars were loaded. When the cars reached destination, these relations were not changed; and, of course, there was no change of relations by the mere fact of the inspections and tests made. Surely it will not be contended that the materials belonged to the Government when they were condemned, on test, and the shippers removed them from the Government's premises. They were the shippers' property at this stage, and they had been the shippers' property all the time.

In the Illinois Central case the stipulations of the contracts were practically the same as those here concerned; but there was no proof of any actual rejections of the materials tendered; and it seems reasonable to assume that if this fact had been present in any of the transactions of that case the judgment would have been in the claimant's favor on those transactions.

These instances of actual rejection, in reality, help to clarify the question of title in all the shipments reviewed in the instant case. If the materials in the other instances were potentially subject to rejection at

destinations, the title was in the same state as when rejections actually were made—it remained in the shippers.

The laws do not require free service from any railroads.

The second matter presented in this case, relating to two lines of railroad and to a few transactions, is that compensation should be on the same basis as that adopted in paying for the other shipments, made on the other lines. These two are of the small class denominated in railroad and Government parlance "free land-grant" lines. By the interpretation put on the land grants at the Treasury those lines received nothing whatever, instead of fifty percent of tariff charges, for services rendered to the Government.

In most of the land-grant acts the Government's reservation was in these terms:

> "The said railroad shall be and remain a public highway for the use of the Government of the United States free of all toll or other charge upon the transportation of any property or troops of the United States." (Act of May 12, 1864, 13 Stat. 164.)

This clause was interpreted, and a long controversy in Congress and the departments settled at the Court of Claims in the Atchison Railroad Company's case, 15 Ct. Cl. 126 (following the Supreme Court's decision in that case and the case of Lake Superior & Mississippi Railroad Co. 93 U. S. 442); the decision being that the Government should have free transportation to the extent of fifty per cent of the tariff rates, as representing the roadway, but should pay fifty per cent as representing the equipment and service.

Appropriations were made year by year for fifty per

cent payments. Finally, the Army Appropriation act of June 30, 1882 (22 Stat. pp. 117, 120, 121), and a Deficiency act of August 5, 1882 (22 Stat. pp. 257, 261) contained the following:

> "For the payment for army transportation lawfully due such land-grant railroads as have not received aid in Government bonds, to be adjusted by the proper accounting officers in accordance with the decisions of the Supreme Court in cases decided under such land-grant acts, but in no case shall be more than fifty per centum of the full amount of the service to be paid, * * *"

This provision was codified in chapter 390, vol. 1 of the Supplement to the Revised Statutes (page 375), and it has been applied ever since in payments for service on railroad lines which received grants in the terms above.

There was never presented for adjudication the "free land-grant" question. The language employed in such cases, included that presented here (Act of July 4, 1866, 14 Stat. 97) is:

> "The said railroad shall be and remain a public highway for the use of the Government of the United States free of all toll or other charge upon the transportation of any property or troops of the United States, and the same shall at all times be transported at the cost, charge, and expense in all respects of the company or corporation, or their successors or assigns, having or receiving the benefits of the land grants herein made."

In the Supreme Court's opinion, by way of illustration, to make clearer the cases decided, reference is made to this latter form of grant. Obviously that reference is a mere dictum; but the accounting officer of the Government took the view that it forbade any

payment whatever over lines having such grants. But whatever may be said on this point, it can not be urged that the act of 1882 made any distinction with respect to the language of the grants.

By the Army Appropriation act of June 16, 1874, (18 Stat. 72, 74), in the case of a grant made to a railroad "on condition that such railroad should be a public highway for the use of the Government of the United States, free from toll or other charge," institution of suits in this court was authorized for whatever might be due. This provision was made permanent the next year (Ib. 453); and by the Sundry Civil act of March 3, 1879 (20 Stat. 377, 390), the Quartermaster General was authorized to make adjustments (in accordance with the decision of the Supreme Court) but not, in the absence of judgment in the individual case, to exceed fifty per cent. All of this, it will be seen, had reference to railroad grantees of the first class indicated above; but obviously the later enactment of June, 1882, codified nine years later, and constituting the permanent law of the whole subject, does not suggest any two classes of mere land-aid. It does not say "any railroad which in whole or in part was constituted by a grant of public land and on condition that such railroad should be a public highway for the use of the Government of the United States free from toll or other charge"; it says "such land-grant railroads as have not received aid in Government bonds." The only distinction is between (1) land-aided roads which had received bond aid also and (2) land-aided roads which had received no bond aid.

During the debates on these measures some sentiment was developed for making fifty per cent payment to bond-aided railroads also; but no such proposal was pressed. There never was any suggestion of admitting

to the benefit of the legislation railroads which had received both lands and bonds, and nowhere was it ever said or hinted that land-aided railroads of any class were excluded. There were in the mind of Congress three classes of railroads, viz., those which had received land aid only; those which had received bond aid only, and those which had received land aid and bond aid both. One of these classes, by mere omission, and another class, by express exclusion, were denied relief. The first class only, viz, roads which had received land aid, obtained permanent rates of partial compensation for services to be rendered.

Congress, of course, knew of the distinction made at the departments, grounded upon the phraseology of the land-granting acts, and it knew of the existing, permanent legislation of March 3, 1879, in behalf of land-aided roads of one class. It knew that "such land-grant railroads as had not received aid in Government bonds," included some railroads which, by the terms of the granting acts, were bound to transport Government property free of charge. If it had been intended to exclude these latter from the new legislation, what would have been simpler than to use the language of the act of 1879, to-wit, "a railroad * * * constructed by the aid of a grant of public land on the condition that such railroad should be 'a public highway for the use of the Government of the United States free from toll or other charge.'" Only by assuming that Congress bandied words carelessly can the legislation of 1882 be read as including only railroads of this latter description.

A part of the legislation of 1882 which especially calls for consideration is the last part-sentence, viz., "and all laws inconsistent herewith are hereby repealed." The laws, as construed by the courts, entitled

some land-aided railroads to fifty per cent pay, and, as interpreted in the departments before 1882, they denied all pay to other land-aided railroads. To legalize such payments in the former case, no repeal of existing law was necessary. In order that like compensation might be paid in the latter case it *was* logical and prudent, if not necessary, to repeal the existing law.

In the Illinois Central case the Court of Claims found that part of the claim accrued between October 30, 1911, and March 7, 1912, and this court inferred that the practice complained of there, and in this case, "had continuity for a long time." The claims will be better understood if it is recalled that long before 1911 the Comptroller of the Treasury, firstly, had upset a settlement by which land-grant rates were applied to property, obviously belonging to the shipper, carried on an ordinary bill of lading, and, secondly, that nothing was gained for the Government in such a case by the use of a Government bill of lading, the only effect of this latter being to induce a mistaken belief on the carrier's part that the title to the property was in the Government. The aim of the device with which these cases are concerned, viz: naming prices as f. o. b. points of shipment, was to evade this latter ruling.

BENJAMIN CARTER,
Attorney for Appellant.

In the Supreme Court of the United States

OCTOBER TERM, 1924

No. 83

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, APPELLANT,

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

Appellant, a land-grant railroad company, in 1910, 1911, and 1912 handled the following shipments.

Coal, from mines in Illinois to and for schools of Standing Rock Indian Agency located in North Dakota, South Dakota, and Minnesota (Tr. 6); and to and for the Quartermaster at Ft. Snelling, St. Paul. (Tr. 6, 7.)

Coal, sand, and cement delivered at Minnehaha, Minnesota, for engineering use on a lock and dam improvement obtained by contracts with Engineer Corps, United States Army, at St. Paul. (Tr. 7.)

Piling and lumber from the State of Washington for engineering improvement at Minnehaha obtained by Engineer Corps at St. Paul, or for harbor improve-

14576—24

ments near Racine, Wisconsin, obtained by the Engineer Corps at Milwaukee. (Tr. 7.)

Piling and lumber obtained from the State of Oregon by the Engineer Corps at Kansas City, Missouri, for Missouri River improvements near Sioux City, Iowa.[1] (Tr. 7.)

Piling and lumber obtained by Engineer Corps at Chicago for improvements in Calumet River. (Tr. 8.)

While it does not appear that the carrier was aware of the terms of the agreements between the Government and the consignors, those agreements provided that the prices named were to apply free on board the cars with the right of inspection either at point of origin or destination, as the case may be, with the right to accept or reject before payment. (Tr. 8.)

The carrier itself applied the land-grant rates and its bills so made out by it were paid without protest. (Tr. 8.) Without any charge of fraud, misrepresentation, deceit, or suppression or withholding of facts of any kind, appellant sued to recover $53,000 as the amount "improperly withheld from it by reason of the application of land-grant freight rates to shipments on Government bills of lading." (Tr. 10.)

In *Illinois Central Railroad* v. *United States*, 265 U. S. 209, this Court affirmed the judgment of the Court of Claims (57 Ct. Clms. 277) which dismissed the petition of the carrier. The similarity of the

[1] Agreements between the sellers and Government officers provided, "This arrangement is made to enable the Government to take advantage of land-grant rates * * *." (See Finding VIII; Tr. 8, 9.)

findings would indicate the Court of Claims in the instant case followed its findings in the *Illinois Central Case*, thus:

Illinois Central	Chicago, Milwaukee & St. Paul
Finding XI	*Finding XI*
The plaintiff's bills were presented to the Government for payment of the net freight for the transportation of said coal and other articles after the proper land-grant deductions had been made by the plaintiff in stating its bills and payment was made to the plaintiff of the full amount claimed on that basis and accepted without protest.	In every instance the plaintiff's bills were presented to the Government for payment of the net freight for the transportation of said coal, sand, cement, and other articles after the proper land-grant deductions had been made by the plaintiff in stating its bills, and payment was made to the plaintiff of the full amount claimed on that basis and accepted without protest.
Finding XIII	*Finding XII*
The Government form of bills of lading used in the transportation of articles in question provided on its face for the hauling of Government property only, and the directions on the back of the same limited their use to Government property. The	The Government form of bills of lading used in the transportation of the articles in question provided on its face for the hauling of Government property only, and the directions on the back of same limited their use to Government property.

agreement on the back of the same between the United States and the carrier stipulated that prepayment of charges should in no case be demanded by the carrier, nor should collection be made from the consignee; that on presentation to the office indicated on the face of the bill of lading properly accomplished, attached to freight voucher prepared on authorized Government form, payment would be made to the last carrier unless otherwise specifically stipulated; that the shipment was to be made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate would be available unless otherwise indicated on the face of the bill of lading.

The agreement on the back of the same between the United States and the carrier stipulated that the prepayment of charges should in no case be demanded by the carrier, nor should collection be made from the consignee; on presentation to the office indicated on the face of the bill of lading, properly accomplished, attached to freight voucher prepared on authorized Government form, payment would be made to the last carrier unless otherwise specifically stipulated; the shipment was to be made at the restricted or limited valuation specified in the tariff or classification, at or under, on which the lowest rate would be available unless otherwise indicated on the face of the bill of lading.

In dismissing the petition, the Court of Claims, in the instant case, said (57 Ct. Clms. 569, 576, Tr. 11):

> In view of what has been said it is hardly necessary to refer to the fact that the bills of

> the plaintiff were presented to the officers of the Government with land-grant deductions, were paid as presented, and payment of the same was accepted by the plaintiff without protest. It is not perceived how the plaintiff can now reopen this question of payment, even though the property transported was not the property of the Government, or how if it were not the property of the Government the latter could be made liable at all for its transportation without affirmative proof that some agent of the Government was authorized to create a liability for the transportation of property not belonging to the Government.

In *Illinois Central Railroad* v. *United States*, 265 U. S. 209, 214, this Court said:

> The Government dealt with the consignors as if the property was its—dealt with the Railroad Company as if the property was its, the Government's, and, as we have seen, the Railroad Company dealt with the Government on that assumption, and the contractors dealt with it on that assumption. The incidental regulations between it and the contractors cannot divest that ownership in the interest of the Railroad Company.

On the authority of the *Illinois Central Case, supra*, the judgment of the Court of Claims should be affirmed.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

OCTOBER, 1924.

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CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 83. Argued December 4, 1924.—Decided March 2, 1925.

A railroad company which made out and presented freight bills to the Government for net transportaton charges after making land grant deductions, and accepted without protest payment of the amount so claimed,—*held* not entitled to recover upon the ground that the Government should not have been allowed the deductions.

58 Ct. Cls. 33, affirmed.

APPEAL from a judgment of the Court of Claims rejecting the Railroad's claim for transportation of freight.

Mr. Benjamin Carter, for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States, submitted.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellant brought this action, October 29, 1917, to recover the amounts by which freight charges on certain materials transported over its railroad were reduced by the application of government land-grant rates. All the freight was transported on government bills of lading and moved in whole or in part by the use of appellant's land-aided lines of railroad. The shipments, including coal, sand, cement, piling and lumber, were made in the years 1909 to 1916, inclusive. Some of appellant's lines of railroads were constructed by the aid of land granted by an Act of Congress of May 12, 1864, § 3, c. 84, 13 Stat. 73. See *Lake Superior & Mississippi R. R. Co.* v. *United States*, 93 U. S. 442; Act of August 5, 1882, c. 390, 22 Stat. 261. The appellant deemed the United States to be entitled to have its property transported over such

lines at 50 per cent. of the tariff rates. Two of appellant's lines of railroad in Minnesota were constructed by the aid of land granted by an Act of Congress of July 4, 1866, § 3, c. 168, 14 Stat. 88. Appellant made no charges for the shipments that moved over these lines. Appellant alleged that when it received and transported such freight it believed it belonged to the United States, and had no intimation that the shipments were private property until the latter part of 1916. The Court of Claims held that all the shipments belonged to the United States, and that it was entitled to transportation of its property at 50 per cent. of the tariff rates on the aided lines first above referred to and to free transportation on those last mentioned, and found that it was not shown whether appellant was informed as to the title to the property.

The court further found that in every instance appellant made out and presented freight bills to the Government for the net charges after making proper land grant deductions, and that the payment of the full amount so claimed was made and accepted without protest. Appellant is not entitled to recover. *Louisville & Nashville R. R.* v. *United States,* decided this day, *ante,* p. 395, and cases cited.

Judgment affirmed.